

No. 78-1275

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

BARRY RINN AND ALEX SELVA, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The opinion of the court of appeals is reported at 586 F. 2d 113.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1978. A petition for rehearing was denied on December 18, 1978. The petition for a writ of certiorari was filed on February 15, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government made available to defense counsel certain notes requested for the purpose of cross-examining a prosecution witness.

2. Whether the trial court erred in admitting into evidence tape recordings of conversations between petitioners and a government informant.

3. Whether the trial court abused its discretion in denying petitioners' motion for a continuance.

4. Whether the government failed to disclose a statement of petitioner Selva in violation of Fed. R. Crim. P. 16.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. In addition, both petitioners were convicted of substantive violations of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner Rinn was sentenced to eight years' imprisonment and a five year special parole term, fined \$10,000, and placed on five years' probation. Petitioner Selva was sentenced to four years' imprisonment, together with three years' probation and a three-year special parole term. The court of appeals affirmed (Pet. App. 19-26).

The evidence at trial showed that Larry Neuberger agreed to sell narcotics for petitioner Rinn (Tr. 259). Thereafter, on several different occasions, Neuberger received cocaine from Rinn and from petitioner Selva (Tr. 259-260, 270). In July 1976, Neuberger obtained a substantial quantity of cocaine from Rinn and Selva and sold one ounce to an undercover police officer, Detective John Abbey (Tr. 271-274). Neuberger was subsequently arrested and agreed to cooperate with the government's investigation into the sources of the cocaine (Tr. 274-277).

Wearing a concealed radio transmitter, Neuberger met with Rinn on a number of occasions to arrange cocaine purchases (Tr. 278-320). Those conversations were recorded by police officers. Rinn and Selva were arrested after Rinn sold four ounces of cocaine to Detective Abbey in October 1976 (Tr. 325-331).

ARGUMENT

1. Petitioners contend that the government failed to furnish defense counsel the handwritten notes made by Detective Abbey, a government witness, in preparing a transcript of the tape recordings used at trial (Pet. 10-12).

Those notes were, however, made available to defense counsel. Prior to the cross-examination of Detective Abbey, the prosecutor announced that the notes were available at counsel table and that he had "no objection" to petitioners' counsel making use of them (Tr. 722). Defense counsel did not take possession of the notes, however, and did not attempt to make use of them during the cross-examination of Abbey (Pet. App. 22 n.1). The court of appeals properly rejected petitioners' claim that the notes had not been made available (Pet. App. 22-23):

* * *[I]t is crystal clear that the Government timely tendered the handwritten notes for the Defense's inspection and use during cross-examination. For reasons known only to defense counsel, the tender was not accepted nor were the notes utilized by the Defense in further cross-examination. The Government could do no more. We believe no rule requires the Government to put Jencks Act or exculpatory materials into defense counsel's pocket after counsel declined to make use of what was tendered.

2. Petitioners argue that the tape recordings of Neuberger's conversations should not have been admitted into evidence because the prosecutors assigned to the case informed defense counsel that the recordings would not be used (Pet. 12-13).

Again, petitioners' contention proceeds on a faulty premise. The original prosecuting attorney merely stated to petitioners' counsel that he was not, as a tactical matter, planning to use the tapes. He made no promise not to use the tapes (Tr. 235-236). When the prosecutor altered his trial strategy and decided to use the tapes, petitioners' counsel

received personal notice one week before trial. Petitioners' counsel had received copies of the tapes several months earlier. Under these circumstances, the court of appeals properly concluded that prior discussions to the effect that the tapes would not be used "cannot be deemed to reach the level of an actual agreement binding on the Government" (Pet. App. 23).

Petitioners' argument that the government failed to lay a proper foundation for the admission of the recordings and accompanying transcripts is equally groundless. As the court of appeals pointed out, Neuberger, a party to the conversations, corroborated the identity of the parties and the substance of their conversations, and he was subject to extensive cross-examination on these subjects (Pet. App. 24). Moreover, the trial court permitted the jury to consider the transcripts and recordings only after a careful examination of their accuracy and audibility (*id.* at 23-24). The court considered all objections concerning errors in the transcripts and corrected the transcripts by reference to the original tapes (*ibid.*). The district court also instructed the jury, prior to playing the tape recordings, that the transcripts were only to be used as an aid in listening to the tapes (*ibid.*).¹

3. Petitioners also argue (Pet. 14-15) that the trial court erred in denying their motion for a continuance, made on the first day of trial. That motion was based on the ground that the government had not previously provided information concerning Neuberger's criminal record or the

inducements offered to Neuberger to obtain his cooperation. Petitioners also argued that additional time was needed to analyze the tape recordings that the government intended to offer in evidence. But the impeaching information regarding Neuberger's criminal record, and the government's inducements to him, was supplied to defense counsel at trial, and that information was fully utilized by counsel during Neuberger's cross-examination (Pet. App. 24-25). No continuance was necessary to permit effective utilization of this information. Moreover, the tape recordings were furnished to petitioners several months prior to trial, and the government gave notice one week before trial that it planned to introduce the tapes. Inaccuracies in the tape transcripts were corrected by the district court prior to the commencement of trial. Under these circumstances, the court of appeals properly concluded that the district court had "exercised sound judicial discretion" in denying a continuance (Pet. App. 25). See *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

4. Petitioners further contend that the government violated the discovery provisions of Rule 16(a)(1)(A), Fed. R. Crim. P., by failing to disclose a statement made by petitioner Selva to a government agent.

This claim is also without merit. Near the close of the trial, Detective Abbey was recalled as a witness by the government. Abbey was asked about a conversation that he overheard between petitioner Selva and Neuberger. Abbey then recounted a statement by Selva indicating that Selva had provided the cocaine that Neuberger was selling to Abbey (Tr. 757).

Rule 16 provides, in pertinent part, that the government must disclose the substance of any oral statement "made by the defendant * * * in response to interrogation by any person then known to the defendant to be a government agent." As noted by the court of appeals, it is manifest that Selva was unaware that either Neuberger or Abbey was a government agent when he made the statement

¹Petitioners' reliance on *United States v. Onori*, 535 F. 2d 938 (5th Cir. 1976), *United States v. Bryant*, 480 F. 2d 785 (2d Cir. 1973), and *United States v. Smith*, 537 F. 2d 862 (6th Cir. 1976), is misplaced. In *Onori*, the trial court gave misleading instructions regarding the accuracy of the transcripts. In *Bryant* and *Smith*, the transcripts contained inaccuracies. In all three cases, the courts of appeals concluded that any errors surrounding the admission of the transcripts were harmless. In the present case, no misleading instructions were given by the trial court, and the transcripts were carefully examined to avoid inaccuracies.

in question (Pet. App. 26). And it is clear that Selva was not under "interrogation" at the time that he made the statement (*ibid.*). Under these circumstances, it was not incumbent upon the government to notify petitioner Selva that his statement might be referred to during the trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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